IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16788 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAVI ARJUN SHAH

Versus

PRINCIPAL SECRETARY

Appearance:

1. Special Civil Application No. 16788 of 2003

MR PR NANAVATI for Petitioner No. 1

MS P B SHETH AGP for Respondent No. 1-4

RULE SERVED for Respondent No. 1-4

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 18/03/2004

ORAL JUDGEMENT

The petitioner above named has preferred this

petition under Article 226 of the Constitution of India for appropriate writ, order or direction, for quashing and setting aside an order of detention dated 19/08/03, passed by respondent no.1 against the petitioner, in exercise of powers u/s.3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "the COFEPOSA Act").

2. The petitioner was detained in view of the aforesaid order of respondent no.1 on the grounds stated at Annexure 'B' page 24. It seems that two Institutions have been involved in the present matter. They are M/s. Siddheshwar Overseas and M/s. Shivam Exports. One of them is a Company and the other one is a Partnership Firm. Indisputably, the petitioner is the Director of the Company and a Partner of the Partnership Firm referred to hereinabove. On account of the allegations made against the petitioner and more particularly described in the aforesaid grounds, the petitioner was ordered to be detained, after following due procedure of law. The petitioner has challenged the said order of his detention on various grounds.

2.1 It has been mainly contended before this Court that there is an unexplained delay in passing the order of detention and such a delay would go to the root of the case. Therefore, the detention order would stand vitiated. It has also been contended that there is a further delay in considering and deciding the representation made by the petitioner against his detention. That the main allegation against the petitioner is that the petitioner was involved in the activities of evasion of excise duties; that even a complaint has also been filed against the petitioner for the above purpose; that there is non-application of mind on the part of the detaining authority in passing the impugned order of detention; that in the order of detention, previous statements of the detenu have been relied upon, in order to hold that the detenu is a habitual offender and therefore, is required to be detained for the purpose of preventing him from continuing the aforesaid alleged activities; that though the statements have been supplied to the detenu, replies submitted by the detenu in the said proceedings, have not been put before the detaining authority and hence, the impugned order cannot be sustained in the eyes of law.

2.2 The petitioner has, therefore, contended

that the order of his detention is illegal and it deserves to be quashed and set aside. The petitioner has, accordingly prayed, that the present petition be allowed, the order of detention be quashed and set aside and the petitioner may be set at liberty forthwith.

3. On receipt of the petition, Rule was issued and in response to the service of notice of Rule, Ms.P B Sheth learned AGP has appeared on behalf of the respondents. I have heard the learned advocates for the parties and have perused the papers. Respondent no.1 has filed affidavit which has been placed at page 43.

4. The learned Sr.Advocate appearing for the petitioner has argued that the order impugned in this petition has been passed on 19/08/03. There is no dispute about the same. He has also contended that there is a delay in passing the order and the said delay has not been explained by the detaining authority. For this purpose, the learned advocate for the petitioner has relied upon Para (c) and (d) of the petition.

4.1 In Para (c) of the petition, it has been contended that there are two cases in which the detenu is said to have been involved. That the said incident had happened on 06/12/02 and there was no case registered against the detenu prior to 06/12/02, nor there was any material to show that the so called prejudicial activities of evading the duty had continued after 06/12/02. That, therefore, in view of the aforesaid facts and circumstances of the case, the order of detention could not have been passed on the said incident, and reliance placed upon the same by the detaining authority would show total non-application of mind.

4.2 Para (d) shows that the said incident of alleged evasion of excise duty is of 06/12/02 and thereafter, not a single case has been registered against the detenu and yet the impugned order has been passed as late as on 19/08/03. Therefore, there was a delay in passing the order of detention. That, therefore, the said order stands vitiated on the ground of delay alone.

5. On the other hand, the State has tried to explain the said delay through the affidavit of the detaining authority placed at page 43 to the petition. In para 4 of the said affidavit, it has been mentioned that the

detaining authority has relied upon two cases, dated 06/12/02 and 11/12/02, against M/s. Siddheshwar Overseas and M/s. Shivam Exports. It has also been stated in the affidavit that a proposal was sent by the Customs Department, Surat to the Commissioner of Customs, Ahmedabad to detain the present petitioner. That a meeting of the Screening Committee was convened and the Committee unanimously decided to detain the petitioner under the COFEPOSA Act. A proposal dated 28/02/03 was received by the State Government on 03/03/03. After considering all these materials and after proper application of mind to the facts and circumstances of the case as well as on the legal provisions applicable to the facts of the case, the detaining authority arrived at a subjective satisfaction that the detenu was engaged in smuggling activities, by way of illegal diversion of dutiable goods from the bonded areas, without payment of duty, by earning and operating 100% E.O.U., with the intention of clandestine diversion of export goods into the domestic market without payment of duty. That, after due scrutiny and subjective satisfaction, the detaining authority had passed the order of detention against the detenu on 19/08/03. The detailed time-table is enclosed with the affidavit at Annexure 'A'.

6. Therefore, by way of the above affidavit, the detaining authority has tried to explain the delay caused in passing the order of detention. When the detaining authority has referred to the time-table explaining the delay, it would be worthwhile to refer to the said time table, with a view to have a complete and clear idea about the delay caused in passing the order of detention. It would be appropriate to reproduce the said time table at page 54 as follows;

D A T E P A R T I C U L A R S

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06/12/2002 Case against M/s.Siddeshwar Overseas was booked

16/12/2002 Summons were issued against Shri Ravi Arjun Shah

11/12/2002 Case against M/s.Shivam Exports was booked

26/12/2002 Summons were issued against Shri Ravi

Arjun Shah

11/01/2003 Statement of Ravi Arjun Shah was recorded and he was arrested in connection with the case of M/sShivam Exports

16/01/2003 Commissioner of Customs, Ahmedabad was requested by Commissioner of Central Excise and Customs, Surat - I to consider the case of Shri Ravi Shah for detention under COFEPOSA ACT 1974

07/01/2003 Shri Ravi Arjun Shah was granted bail

18/01/2003 Shri Ravi Arjun Shah was arrested in connection with the case of M/s.Siddheswar Overseas

20/01/2003 Shri Ravi Shah was granted bail

23/01/2003 Materials were supplied to Commissioner of Customs, Ahmedabad by Commissioner of Central Excise and Customs, Surat - I

03/02/2003 Initially the meeting of the Screening Committee was fixed but later on postponed to 13/12/03

19/02/2003 Meeting of the Screening Committee was convened and unanimously approved for the detention of Shri Ravi Arjun Shah under COFEPOSA ACT, 1974

27/02/2003 After getting the confirmation from the Joint Commissioner, Customs, Ahmedabad preparation of documents which were to be submitted to the State Government, including the translation of documents in Gujarati and Hindi to English were completed

28/02/2003 Proposal along with required documents were submitted to the State Government by Commissionerate of Central Excise and Customs, Surat - I

03/03/2003 Proposal was received by the State Government

02/04/2003 Proposal was primarily scrutinized and it was suggested to sought clarification from Central Excise Surat - I which approved on 10/04/03

12/04/2003 Commissioner of Central Excise and Customs, Surat - I was asked to provide some more documents as well clarifications.

28/04/2003 Requisite documents / informations were received by the State Government from Commissioner of Central Excise and Customs, Surat - I

21/06/2003 Residential address as well status of the cases booked against Shri Ravi Arjun Shah were sought from Commissioner of Central Excise and Customs, Surat - I

07/07/2003 Proposal was scrutinized and draft order / grounds for detention were submitted

13/07/2003 Information with respect to letter dated 21/06/03 were received from Commissioner of Central Excise and Customs, Surat - I

23/07/2003 Commissioner of Central Excise and Customs, Surat - I was asked to provide some more information

24/07/2003 Some information was received from Commissioner of Central Excise and Customs, Surat - I, with respect to State Government letter dated 24/07/03

08/08/2003 Some documents were provided by Commissioner of Central Excise and Customs, Surat - I

08/08/2003 Note was put up by the Dy.Secretary (L & O) and the file was sent to Secretary (Home)

09/08/03 &
Holidays being 4th Saturday
10/08/2003

11/08/2003 The file was cleared by the Secretary (Home) and sent to Principal Secretary (Home)

12/08/03 & 15/08/2003 Holidays being Rakshabandhan Festival and Independence Day respectively

16/08/2003 After subjectively satisfied Empowered Officer i.e. Principal Secretary (Home) decided to pass the detention order against Shri Ravi Arjun Shah to detain him under COFEPOSA ACT, 1974

17/08/2003 Holiday being Sunday

19/08/2003 Detention order was passed against Shri Ravi Arjun Shah

20/08/03 & 21/08/2003 Public Holidays being Janmashtami and Parsi New Year respectively

22/08/2003 Detention order as well grounds of detention along with set documents were handed over to the Officer of Commissionerate of Central Excise and Customs, Surat - I, to serve the same to the detenu

23/08/2003 Detention order was executed and the detenu was lodged in the Central Prison, Ahmedabad

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7. Now, it is not much in dispute that even according to the detaining authority, the proposal for the detention of the petitioner was sent by the Customs Department to the State Government on 28/02/03 and it was received by the State Government on 03/03/03. We may not seriously dispute the same, as it was not seriously disputed, at the time when the matter was argued at length. In other words, the proposal dated 28/02/03 was received by the State Government on 03/03/03. Therefore, we will be required to consider the delay caused after

28/02/03. On going through the above time-table, we can find that on 02/04/03, the proposal was primarily scrutinized and it was suggested to seek clarification from the Department of Central Excise, Surat - I, which was approved on 10/04/03.

8. This would suggest that after the receipt of proposal from the Customs Department by the State Government on 03/03/03, the first action that was taken by the State Government was on 02/04/04. Neither the affidavit nor the time-table suggests as to how the matter was dealt with, during the period of a month between 03/03/03 and 02/04/03. This delay on the part of the State Government has remained unexplained in the affidavit of the detaining authority as well as in the time-table attached to the affidavit by the detaining authority itself. This would mean that the matter was untouched during the entire above mentioned period.

8.1 It has then been suggested from the time-table that the Commissioner of Central Excise and Customs, Surat - I was asked to provide some more documents as well as clarification on 12/04/03. It has then been stated on 28/04/03 that requisite documents were received by the State Government from the Commissioner of Central Excise and Customs, Surat - I. Then on 21/06/03, residential address as well as status of cases booked against Ravi Arjun Shah were sought from the Commissioner of Central Excise and Customs, Surat - I. This would suggest that again there was no action on the part of the State Government between 28/04/03 and 21/06/03. This is a period of about two months, during which there seems to be no action on the part of the State Government in dealing with the matter in question.

9. Then, it further suggests, that on 07/07/03, the proposal was scrutinized and draft order / grounds for detention were submitted. It also shows that on 13/07/03, some queries were raised by the Dy.Secretary (L & O). It is also stated in the time-table that on 23/07/03, information with respect to letter dated 21/06/03 was received from the Commissioner of Central Excise and Customs, Surat - I. Then, on 24/07/03, the Commissioner of Central Excise and Customs, Surat - I was asked to provide some more information. On 04/08/03, information was received from the Commissioner of Central Excise and Customs, Surat - I with respect to the State Government letter dated 24/07/03. Then on 08/08/03, some

documents were provided by the Commissioner of Central Excise and Customs, Surat - I. On 08/08/03, a note was put up by the Dy. Secretary (L & O) and the file was sent to the Secretary (Home). 09/08/03 and 10/08/03 were public holidays. On 11/08/03, the file was cleared by the Secretary (Home) and it was sent to the Principal Secretary (Home). Again on 12/08/03 and 15/08/03 there were public holidays. On 16/08/03, the Principal Secretary, Home Department, decided to pass an order of detention against Ravi Arjun Shah. Again there were public holidays on 17/08/03 & 18/08/03 and therefore, the detention order was passed on 19/08/03.

10. Even on appreciation of the aforesaid affidavit and time-table, it is clear that there was no action on the part of the State Government, after the receipt of the proposal from the Central Government on 03/03/03. There was a gap of about one month in starting the process on the said proposal. Again there was a gap of about two months from the period between 28/04/03 and 21/06/03. Looking to the manner in which the proposal has been dealt with by the State Government, it cannot be said that there was no delay on the part of the State Government in processing the proposal and in passing the order of detention against the petitioner.

11. The order of detention would be required to be passed mainly on the ground that it is necessary to immediately detain the petitioner, with a view to prevent him from continuing his illegal activities. For this purpose, prompt action is necessary. If the Department did not want to take a prompt action against the detenu, then it was open to the Department to deal with the petitioner under ordinary law applicable to him and not under the Preventive Detention Laws. The very object of enacting a Preventive Detention Law is to provide for an emergent power to the authority to detain a particular person immediately, with a view to prevent the said person from further continuing his illegal activities. Therefore, prompt action is always required and the delay in taking action is normally deprecated.

12. In order to substantiate the said argument, the learned advocate for the petitioner has relied upon a decision in the case of Pradip Nilkanth Paturkar V/s. S Ramamurthi & Ors. reported in 1993 Supp (2) SCC 61. In the said matter, criminal cases were filed in November, 1990 and January - February 1991 against the detenu under the Bombay Prohibition Act, 1949. The statements of witnesses relating to criminal cases were recorded in March, 1991 only after the release of the detenu on bail.

A proposal for detention was submitted by the sponsoring authority in April, 1991. It was accepted in July and detention order was passed in August, 1991 by relying on the cases registered against the detenu and statements made by the witnesses and referring to the statements in the grounds of detention. The Hon'ble the Supreme Court held that unexplained delay, whether short or long, especially when appellant had taken a specific plea of delay, vitiated the detention order. It would be worthwhile to refer to Para 12 of the said decision as follows;

Para 13 : "Coming to the case on hand, the detention order was passed after 5 months and 8 days from the date of the registration of the last case and more than 4 months from submission of the proposal. What disturbs our mind is that the statements from the witnesses A to E were obtained only after the detenu became successful in getting bail in all the prohibition cases registered against him, that too in the later part of March 1991. These statements are very much referred to in the grounds of detention and relied upon by the detaining authority along with the registration of the cases under the Act."

12.1 The learned AGP has argued here that the said matter related to the Preventive Detention under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug Offenders Act, 1981 and the present detention is under a different law which is more strict in nature. At the same time, the principle of preventive detention has been laid down by the Hon'ble the Supreme Court and therefore, it is required to be considered accordingly.

13. Then, we can turn to a decision in the case of Ahamed Mohaideen Zabbar V/s. State of T.N. & Ors. reported in (1999) 4 SCC 417. It will be relevant to consider here that the detention challenged in the said matter was a detention u/s.3 of the COFEPOSA Act. Therefore, now it would not be open to the respondents to say that the matter decided by the Hon'ble the Supreme Court was under the Gujarat P.A.S.A. Act. There it is found that the matter related to smuggling of gold biscuits. The detenu had admitted his guilt on 08/12/97 and 19/12/97. The order of detention was passed much later on 23/11/98. The delay was not properly explained and therefore, the detention order was ordered to be quashed.

13.1 It can be gathered from the said decision that the State Government tried to explain the delay. However, the Hon'ble the Supreme Court did not find the said explanation satisfactory and acceptable. The Hon'ble the Apex Court observed that the State Government had not explained the fact as to why it thought it necessary to wait till the adjudication proceedings before the Customs authority were over since that was not necessary for exercising the power under the COFEPOSA Act. Therefore, in the absence of any satisfactory explanation, the order of detention was held to be unreasonable and was ordered to be quashed.

14. In the case of Rajan Worlikar V/s. State of Karnataka & Ors. reported in (2001) 5 SCC 295 referred to by the learned AGP, it has been observed that when an order of detention was passed about five months after the arrest of the detenu and when the delay was satisfactorily explained, then the detention order cannot be said to be illegal on the ground of such a delay.

15. Similar view was adopted by this Court in the case of Jeevan G. Tandel V/s. Union of India & Ors. reported in 1996 (1) GLH 419. It was also a case of detention under the COFEPOSA Act. In the said matter, there was a delay in the making of the detention order and also delay in complying with the procedural safeguards of Art.22(5) of the Constitution of India. It was observed that the delay of one year and 27 days between the date of the incident and the date of detention order, has not vitiated the satisfaction of the detaining authority in the facts and circumstances of the case. In other words, if the delay has been satisfactorily explained, then it would not go to the root of the case and it would not vitiate the order of detention.

16. In the case of Harish Anand V/s. Union of India & Ors. reported in 1996 (1) GLH 234, there was a delay of 13 months in passing the order of detention. There it has been observed that the delay was not occasioned by laxity on the part of the sponsoring authority or the detaining authority, but was a result of full and careful consideration of the facts and circumstances of the case and that the delay was satisfactorily explained. It has further been observed that the test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts

and the order of detention; and that the nexus between the date of incident and the passing of order as well as the object has to be maintained.

17. Therefore, the citations relied upon by the learned advocates for the parties clearly go to show that simply because there is a delay, it would not vitiate the proceedings and would not, consequently, vitiate the detention order. At the same time, it would depend upon the delay and the explanation for the delay. A casual short delay which can be attributed to the procedure may not vitiate the proceedings and would consequently, not vitiate the detention order. Whether the delay is long or short, but if it is coupled with a satisfactory explanation, then such a delay has to be accepted and the order of detention would not stand vitiated on the ground of such delay. On the other hand, if the delay has not been explained, then it would be fatal to the order of detention. These are the principles enunciated in the foregoing decisions.

18. On applying the above principles to the facts of the case on hand, it is extremely clear that though the sponsoring authority had submitted a proposal to the detaining authority as back as on 28/02/03, as per the time-table at page 54, the detaining authority did not undertake any process during the entire period of one month. We find that there is absolutely no explanation rendered, either by the sponsoring authority or by the detaining authority, for explaining the delay of one month. Then, again between 28/04/03 and 21/06/03 there was a delay of more about month and again there is no explanation for the said delay of more than a month.

19. Therefore, it is apparently clear that there was a delay in exercising powers of detention, referred to hereinabove, and the records do no explain the delay caused on the part of the detaining authority, in passing the order of detention.

20. It is, therefore, clear that when the order of detention has been passed after delay and when the delay has not been explained, then in that event, the order of detention will stand vitiated. In aforesaid view of the matter, I am of the view that the detaining authority has passed an order of detention, after long delay referred to hereinabove. I am also of the opinion that the delay has not been explained to any extent by the detaining authority and therefore, the order of detention will stand vitiated on the ground of delay alone. In that view of the matter, it would not be necessary to touch

and consider other grounds on which the detention has been challenged.

21. On the aforesaid aspects of the case, it is clear that the detention stands vitiated on the ground of delay and therefore, it is required to be quashed and set aside.

22. For the foregoing reasons, this petition is allowed. The order of detention dated 19/08/03 passed by respondent no.1 against the petitioner u/s.3(1) of the COFEPOSA Act, 1974 is ordered to be quashed and set aside. The detenu shall be set at liberty forthwith, if no longer required in any other case. Rule is made absolute with no orders as to costs. Direct service permitted.

(D. P. Buch, J.)

pravin/